In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 100

JOE ALTIERE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner was convicted, after a jury trial, on both counts of an indictment charging him with violations of 26 U.S.C. 7203, relating to certain wilful omissions under the Internal Revenue Code. Count I of the indictment charged petitioner with wilful failure to pay the special occupational tax imposed by Section 4411 of the Code upon persons engaged in the business of accepting wagers on their own account or for others; Count II charged petitioner with wilful failure to register under Section 4412 of the Code as a person required to pay the special occupational tax (R. 3–4).[1] Petitioner received sentences of

[1] "R. —" refers to the Appendix to petitioner's brief in the court of appeals.

sixty days' imprisonment on each count, the terms to run concurrently, and three years' probation on each count, the terms to begin at the expiration of the prison sentences and to run concurrently. In addition, a fine of $1,000, plus the costs of prosecution, was imposed under Count I (R. 131). The court of appeals affirmed (Pet. App. 1–8).

The petition raises a number of challenges to the conviction, among them the contention that petitioner was entitled under Count I to an instruction on a lesser included offense. We agree that petitioner had such a right under this Court's recent decision in *Sansone* v. *United States,* 380 U.S. 343, and that this error warrants a new trial. Accordingly, we confine our discussion to this issue.

The evidence at trial showed that, during the evenings of August 6, 7, and 9, 1963, petitioner was seen by an F.B.I. agent at Sportsman's Park Race Track, Chicago, Illinois, under circumstances creating a suspicion that petitioner was engaged in the business of accepting wagers (R. 40–41). On August 20, 1963, an Internal Revenue Service agent observed petitioner near a stairway at the racetrack, and placed two horse race bets with him. Petitioner accepted money tendered by the agent and made a notation on a slip of paper (R. 31–32). On the following evening, petitioner was again observed at the same location; the agent again placed a horse race bet with him which petitioner recorded; and the agent collected winnings from petitioner after the race (R. 32–33; Government

Ex. 1). The same process was repeated on August 23, 1963 (R. 33; Government Ex. 3). On none of these occasions was petitioner observed going to the racetrack betting windows (R. 32, 34–39). On August 24, 1964, an arrest warrant was issued. That evening petitioner was again observed by agents, and an agent used a marked ten-dollar bill to place a bet with him (R. 33–34, 36, 42–43; Government Ex. 5). Petitioner was then arrested (R. 44).

One of the issues at trial was whether petitioner's failure to register and pay the special tax under the Code had been wilful, *i.e.*, whether the jury "might conclude from all of the circumstantial evidence that the defendant knew of the existence of the statute and the requirements thereunder" (R. 123). At the close of trial, petitioner requested an instruction under Count I (R. 125) that, should the jury find that petitioner "was a person required to pay the tax * * * and that he did fail to pay such tax" but that "there is no independent evidence on which you could find that such failure was done with a bad or evil motive," then the jury might "return a verdict of guilty upon a lesser offense, which is found in Title 26 United States Code Section 7262" making failure to pay the tax a crime regardless of wilfulness and imposing

only a fine, rather than the fine and jail sentence provided by Section 7203 for wilful failures.[2] This instruction was refused.

In *Sansone* v. *United States,* 380 U.S. 343, 349–350, decided after the decision of the court of appeals in this case, the government contended, and the Court held, that " '[i]n a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justifie[s] it * * * [is] entitled to an instruction which would permit a finding of guilt of the lesser offense' " but that "[a] lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense." In this case, the offense charged in Count I under Section 7203 required a disputed element—wilfulness—not necessary to conviction under Section 7262. In all other respects, the elements of the two offenses were the same. Petitioner, having made a proper request, was thus entitled under *Sansone* to the Count

[2] Section 7262 of the Code provides:

> Any person who does any act which makes him liable for special tax under subchapter B of chapter 35 without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.

I instruction relating to Section 7262. We believe this error warrants a new trial.[3]

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

JULY 1965.

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[3] An argument supporting the conviction could be made, despite the error on Count I, if the conviction on Count II could be sustained, for a concurrent jail sentence was imposed on that Count and the fine imposed on Count I was the minimum which could have been imposed under Section 7262. Petitioner requested a lesser-included offense instruction on Count II as well as on Count I, and this instruction was also refused (R. 125–126). Count II charged a wilful failure to register, and the requested instruction was under Section 7272 of the Code, which provides:

> Any person * * * who fails to register with the Secretary or his delegate as required by this title or by regulations issued thereunder shall be liable to a penalty of $50.

Whether the analysis given above in regard to the requested Count I instruction also applies to the requested Count II instruction turns on the question whether Section 7272 creates a civil penalty (as we believe likely) or defines a criminal offense. This question has not been the subject of any considered decision in the lower federal courts, and we do not press it upon this Court but suggest, rather, that the entire case should be remanded for a new trial in the light of the intervening *Sansone* decision.